

James Durham, Esq; Appellant.

Robert Lundin, Alexander
Watson, John Lundin, and } Respondents.
James Lundin, Esqs;

The Appellant's C A S E.

THAT the Appellant being Patron of the Parish of *Largoe* in *Scotland*, and as such having a Right to the whole Tythes of the Parish, after a Deduction of a Maintenance to the Parson, was (as all other Patrons were) by an Act of Parliament pass'd in the fifth Year of their late Majesties King *William* and *Queen Mary*, freed from paying out of his own proper Lands, any Share of the Maintenance given to the Parson of the said Parish, if there should be sufficient Tythes besides for that Purpose.

That the Respondents, or those under whom they claim, had some time since purchas'd from the Appellant's Predecessors long Leases of their respective Tythes, and the said Leases being within seven or eight Years of expiring, the Respondents (to prevent the said Tythes returning to the Appellant, and who, as Patron, had a Right to them) prevailed on the present Incumbent, to crave an additional Maintenance, on Pretence that what he had was not sufficient.

That the said Incumbent, when the Appellant was an Infant, procured a Decree from the Commissioners, for Plantation of Kirks in *Scotland*, in 1698, for an additional Maintenance of about Fourteen Pounds *per An.* and thereby appointing the respective Shares, payable by the several Proprietors of the said Parish, to the said Incumbent of his whole Maintenance; and the Respondents, in Consideration of the Shares, they were respectively to pay of the said additional Maintenance of about Fourteen Pounds *per Annum*, procured from the said Commissioners, a Prolongation of their several Leases of their respective Tythes for 114 Years, to commence after the former Leases should expire.

That the Appellant, by such Decree, is not only deprived of the great Advantage he might have had, by selling the said Tythes to the several Proprietors of the Lands of the said Parish, or of renewing Leases of the said Tythes, after the Expiration of the former Leases; but also his own proper Lands, by the said Decree, are made subject to the Payment of a considerable Part of the said Maintenance to the Parson, contrary to the express Provision of the said Act of Parliament, the said Tythes of the said Parish exclusive of the Appellants, being sufficient with an Overplus to answer the said Stipend.

That this Decree being made, and these Prolongations of the Leases granted when the Appellant was under Age; he finding himself thereby greatly aggrieved, did, when he came of Age, sue for Relief in the Premises before the Lords of Council and Session, who by a late Statute, are empower'd to determine in Matters relating to planting of Kirks, and valuing of Tythes.

That the said Cause was heard before the said Lords, the Twenty third of *June*, 1708; and they declared that the Appellant was not prejudiced by his not claiming that his proper Lands ought to have been exempted from paying his Proportion of the Minister's Stipend, and therefore refused to relieve the Appellant from the said Decree of the Commissioners, for planting of Kirks in 1698, and dismissed his Suit.

That the said Lords, upon the Appellant's Application, reheard the Cause and by a Majority only of one Vote, affirmed their former Decree.

Which Decree the Appellant humbly hopes shall be reversed for these Reasons.

I. That the Patron, from the time of the Reformation, till the late Revolution, had not only the Privilege of presenting a Clerk to the Benefice, but by Act of Parliament was expressly authorized to make an Agreement with the Clerk to be presented by him: That as soon as the Clerk should be inducted, he should make a Lease of all the Tythes of the Parish to the Patron, reserving only a sufficient Maintenance for the Parson: And the Patron, as Lessee of all the Tythes, was entitled to burthen any of the Tythes of the Parish he thought fit, with the Payment of the reserved Maintenance for the Parson, and exempt his own Lands from any Part thereof. But the Patrons at the Revolution being deprived, not only of the Privilege of presenting of a Clerk, but also of taking such Leases of the Tythes from the Parson, and an Exemption of his own Lands, from paying any thing to the Parson. The Parliament in Recompense of this, gave the Patron a Right to all the Tythes of the Parish, with the Burthen of a Maintenance for the Parson, and of the several Leases granted, or to be granted. And by a subsequent Statute it is expressly provided, that the Tythes of the Lands belonging in Property to the Patron, should be freed from paying any Part of the Maintenance to the Parson; but that the same should be layed on proportionably upon the Tythes of the respective Proprietors of the Parish, so that the said Decree of the Commissioners for planting of Kirks in 1698, whereby the Appellants own proper Lands were burthened with a considerable part of the Parson's Maintenance, seems expressly against the said Act of Parliament, and therefore the Appellant ought to have been relieved against the same, having been made during the Appellant's Infancy and Nonage.

II. That tho', by the Act of Parliament 1690, the Patrons Right to the Tythes, is burthened with the several Leases already granted, and such Prolongations thereof as should be made, yet as that only excludes the Patron from making any greater Demand, upon the several Lessees, during the Continuance of the Leases than what is contained in their respective Leases; so that does not preclude, that after the expiring of the said Leases, that the part of the Maintenance payed by the Patron, ought to be laid proportionably on the respective Proprietors of the Lands of the Parish, who, in recompence thereof, have their several Leases prolonged to them; whereas the Patron, if his own Lands are not exempt, is deprived of the only Privilege granted him, as a Recompence, for the Loss of the Advowson, and might always be so by a groundless Pretence for a trifling additional Stipend, whilst any former Leases are not expired; so that it was competent to the Appellant, and he might very well have pleaded before these Prolongations were granted, that after the Expiration of the Leases formerly granted, the Lands belonging in Property to the Appellant, might be exempt from paying any Part of the Stipend, since there were more than sufficient Tythes in the Parish besides his to answer the Parson's Maintenance, and if he might have pleaded this, then being an Infant, when that Decree was pronounced, it is apprehended, he may plead it still and ought to be relieved therein.

III. That as the Patron's Right to these Tythes is burthened by the Act 1690, with the Prolongations to be granted, of the Leases formerly made of the Tythes of the said Parish, so the Act expressly imports that these Prolongations shall be *effeirand* (*i. e.* proportional) to the additional Maintenance granted, but in this Case there is no Proportion at all for the Additional Maintenance is about 14 *l. per Annum*, and the Tythes of the said Parish exclusive of those of the Lands, belonging in Property to the Appellant over and above paying of the whole Maintenance to the Parson will be about 100 *l. per Annum*. When this Decree was pronounced in 1698, there were eight Years only of the former Leases to run, and yet the Respondents upon the Account of that additional Burthen of 14 *l. per Annum* for these eight Years, procured their several Leases to be prolonged to them for 114 Years after the former Leases should expire, and that the Appellants own Lands should likewise be burthened with a considerable part of the Parson's Maintenance. There is certainly then no Proportion between the Burthen imposed and the Prolongations granted, which is expressly contrary to the said Act: But to take away any pretence for these long and extravagant Prolongations, the Appellant, during the Continuance of the said Leases, would have taken upon himself the Burthen of the said 14 *l. per Annum* of Additional Maintenance; so there remained no Shadow of Reason for these new Prolongations, and the Respondents have been sufficiently recompensed for the Burthen of the Additional Maintenance of 14 *l. per Annum* for these eight Years, by their receiving, by Vertue of the said Prolongations, the whole Tythes of the said Parish, for these five Years since the Expiration of their former Lease being 100 *l. per Annum*.

Wherefore the Appellant humbly hopes that the said Decree, affirming these Prolongations granted to the Respondents shall be reversed, and the Appellant be restored to the Possession of the Tythes, as if no such Prolongations had been granted

JO. PRINGLE.